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Supreme Court, U.S.
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In The

Supreme Court of the United States

ROSS A. CAPUTO AND ROBERT RILEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARC W. MARTIN*
**Counsel of Record*
MARC MARTIN, LTD.
53 West Jackson Blvd.
Suite 1420
Chicago, IL 60604
(312) 408-1111
Counsel for Petitioner Ross A. Caputo

SAMUEL ROSENTHAL
CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
1200 New Hampshire Ave.
Washington, D.C. 20036
(202) 452-7340
Counsel for Petitioner Robert Riley

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the jury foreman's failure to disclose his criminal background consisting of six misdemeanor convictions and a long history of felonious drug activity deprive the petitioners of a fair trial in violation of the Fifth and Sixth Amendments.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 517 F.3d 935 (reprinted at App. 1-19). The orders relating to the denial of the petitioner's motion for new trial based on the jury foreperson's *voir dire* are unpublished and can be found in the transcript of the proceedings for September 5, 2006 (reprinted at App. 62-65). Additional opinions of the United States District Court for the Northern District of Illinois relating to issues not raised in this petition are reported at 456 F.Supp.2d 970, 382 F.Supp.2d 1045, 374 F.Supp.2d 632, 373 F.Supp.2d 789, 313 F.Supp.2d 764, 288 F.Supp.2d 923 and 288 F.Supp.2d 912.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2008. Petitioner did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * .

STATEMENT OF THE CASE

1. Petitioner Ross A. Caputo, a scientist who sometimes served as a consultant for the United States Food and Drug Administration ("FDA"), served as the President and CEO of an Illinois company known as AbTox, Inc. Petitioner Robert Riley, an employee of AbTox, was in charge of regulatory affairs.

In 1990, AbTox submitted a 510k submission to the Federal Food and Drug Administration ("FDA"), seeking approval to market a medical device sterilizer called the Plazyte, which had a one-cubic-foot chamber and used a two-bottle 10% acid solution. The FDA approved the Plazyte in December 1994. Consolidated Brief of Defendants-Appellants Ross Caputo and Robert Riley filed in the United States Court of Appeals for the Seventh Circuit ("Defts' CTA7 Brief"), pp. 2-3.

Between 1990-1994, AbTox improved and modified the sterilizer. For example, AbTox enlarged the chamber size to approximately five-cubic feet and implemented a single-bottle system that used a premixed commercially available 5% peracetic acid solution. AbTox did not initially seek FDA approval

for the modified version because it had concluded that the modified version did not significantly affect the safety or effectiveness of the device. See 21 C.F.R. § 807.81(a)(3) (2003). (The FDA has explicitly determined that the "manufacturer is the person best qualified to make the decision" whether a new 510k is required. 42 Fed. Reg. 42520 (Aug. 1977)). Defts' CTA7 Brief, pp. 3-4.

AbTox marketed the modified sterilizer, telling hospitals that the FDA had approved the Plazlyte in 1994, without stating that the approval related to the one-cubic-foot model. Between 1994 and 1998, approximately 168 modified sterilizers were sold to hospitals in the United States. Defts' CTA7 Brief, p. 6.

On May 9, 1995, AbTox submitted a new 510k for expanded label copy. This 510k stated that the chamber size was 4.5-cubic-feet, and that the device used a 5% peracetic acid solution. On March 4, 1996, AbTox submitted a revised 510k submission, seeking label change approval, and advising why AbTox did not view the changes to the sterilizer as significant. Defts' CTA7 Brief, pp. 4-5.

The FDA advised for the first time on May 31, 1996 that the changes required a new 510k. The letter warned that AbTox "may not market this device until you have received a letter from FDA allowing you to do so." AbTox later withdrew its expanded label copy request, but continued to market the device with the FDA's knowledge. AbTox later made

two additional 510k submissions, one on February 18, 1998, followed by a supplemental submission on March 31, 1998. The FDA did not approve any of these 501k submissions. Defts' CTA7 Brief, pp. 4-6.

Patients at some hospitals using the Plazyte suffered "corneal decompensation" of the eyes. While unusual, these injuries were not unheard of, and had sometimes been attributed to detergent. Some of the incidents were disclosed to AbTox and others were not. AbTox did not file any Medical Device Reports ("MDR"). In February 1998, the Center for Disease Control investigated the eye injuries, and was unable to identify the cause. Defts' CTA7 Brief, pp. 8-12.

The FDA conducted an inspection at AbTox on January 29, 1998 that lasted for several days. On March 5, 1998, the FDA issued an inspection notice, which summarized the lack of 510k clearance, as well as the failure to file an MDR. After a meeting with FDA inspectors on March 27, 1998, AbTox voluntarily sent a letter to hospitals asking them to stop using Plazlyte with ophthalmic instruments. Defts' CTA7 Brief, p. 12.

Around April 2, 1998, the FDA's website instructed Plazlyte users not to sterilize equipment or containers that may contain solder, brass, copper or zinc, and not to use it for ophthalmic instruments. The posting further stated that the FDA had instituted a worldwide recall and that the Plazlyte had never been cleared. AbTox's inventory was seized on April 17, 1998. Defts' CTA7 Brief, p. 13.

2. Prosecutors in the Northern District of Illinois aggressively prosecuted the petitioners. App. **. They sought and obtained an indictment charging the petitioner and three others with conspiracy, mail fraud, and misdemeanor sale of adulterated and misbranded medical sterilizers. Two defendants pled guilty to reduced charges. After extended pretrial wrangling, the petitioners underwent a jury trial. The jury returned guilty verdicts on all counts. The district court sentenced petitioners Caputo and Riley to ten and six years, respectively, and entered a restitution judgment in the amount of $17,209,074.50. App. 20-61; Defts' CTA7 Brief, p. 2.

3. Because the issue raised in this petition relates to jury selection, petitioners review the relevant facts here.

In addressing the venire, the district court emphasized the importance of answering questions honestly. The court repeatedly directed the prospective jurors to "soul search," and reveal anything that could affect neutrality, including impediments. The court urged the jurors to bring up anything, and volunteered to hold private discussions about discomforting matters. Defts' CTA7 Brief, p. 59.

The district court asked the entire venire, "Do any of you have yourselves or any close friends or relative who have ever been charged with a criminal offense?" Tim Ryan – who turned out to be the foreperson – remained mute. During individualized *voir dire*, Ryan said that he had been married ten years,

had four children with whom he spent his spare time, acted as Cub Scout leader and liked certain outdoor activities. Defts' CTA7 Brief, pp. 59-60.

The front-page headline of the *USA Today*'s July 20, 2005 edition (issued sometime following the verdicts but before sentencing) read: *1 in 5 adults have a close relative who is or was addicted to drugs or alcohol. In Tim Ryan's family he is the addict.* The article stated that Ryan had claimed to have stopped drinking and using heroin six months previous (a few weeks before jury selection) and had started using methadone around January 2005. Defts' CTA7 Brief, p. 60.

Petitioners moved for a new trial. The government argued that the parties would have evaluated Ryan no differently had they known about Ryan's background and that Ryan "didn't receive a criminal conviction." A subsequent background check, however, revealed that Ryan had six misdemeanor convictions and other arrests. Defts' CTA7 Brief, p. 60.

The district court conducted a post-trial hearing in which it questioned Ryan based on some (but not all) questions submitted by the parties. At the hearing, Ryan denied drinking or using drugs around the time of the trial, or having harbored any bias. Ryan gave differing answers about his drug usage, including methadone and suboxone. He said that he stopped "using" six months before trial, but also that it had been one year. At one point, he claimed he last used illegal drugs on December 31, 2004, but took

methadone for about a year. He also testified that he stopped using methadone in September 2005. Finally, Ryan said he had used suboxone for six to eight weeks (following the methadone), and quit using drugs altogether around the end of March 2005 (but since then had used pain medication for a back injury). Defts' CTA7 Brief, pp. 60-61.

Ryan admitted recalling the *voir dire* question about criminal history. He excused his failure to disclose six misdemeanor convictions because he "was under the assumption there that when [the judge] had asked that question if they were federal charges, and that's why – I mean I wouldn't consider a DUI or things like that. I didn't realize those are . . . criminal charges." Defts' CTA7 Brief, p. 61.

Immediately following the conclusion of Ryan's testimony, the district court found Ryan to be credible, and denied the defense request for a new trial. App. 62-65.

4. Petitioners appealed their convictions to the United States Court of Appeals for the Seventh Circuit. In an opinion authored by Judge Easterbrook, the court of appeals ruled that the district court had not abused its discretion in its handling of the juror issue. The court of appeals affirmed the convictions and sentences, but vacated and remanded the restitution judgment. App. 1-19.

REASONS FOR GRANTING THE PETITION

I. THE JURY FOREMAN'S FAILURE TO DISCLOSE HIS CRIMINAL BACKGROUND DEPRIVED THE PETITIONERS OF A FAIR TRIAL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS

What is going on with the jury pools in the Northern District of Illinois? Petitioner's jury trial occurred while the former Governor of Illinois, George H. Ryan, and a co-defendant, Lawrence E. Warner, were being tried in the same courthouse. A series of well-publicized jury mishaps surfaced during the *Warner/Ryan* trial. Indeed, two jurors were dismissed from deliberations because they had lied about their backgrounds during *voir dire*. A number of other sitting jurors in the *Warner/Ryan* case made false statements on their jury questionnaires. See *United States v. Warner*, 498 F.3d 666, 689 (7th Cir. 2007), pet. cert. filed, No. 07-977.

Similarly, in this case, Tim Ryan – who turned out to be the foreman – was not forthcoming about his criminal background during *voir dire*. Rather, he related how he had four children and purported to be active in the Cub Scouts. Fairly viewed, Ryan's *voir dire* responses depicted him as a "family man." Nothing could have been further from the truth. If Ryan had told the truth during *voir dire*, his narrative might have gone something like this:

> My name is Tim Ryan. I am married and have four children. If it wasn't for my wife

> and kids I'd be dead. I have been a heroin addict, cocaine abuser and alcoholic for the past 16 years and routinely committed felonious possession. I just stopped using the drug suboxone. Prior to that, I used methadone for about a year. Although I like to spend time with my children, my addiction has hampered my relationship with them and I sometimes took household money to support my habit and have been convicted of domestic battery.
>
> I have been convicted of six misdemeanor offenses. I was first convicted in 1990 for a theft offense. I was charged with felony forgery in Texas, but it was reduced to a false statement misdemeanor and I was sentenced to probation. When I was convicted of domestic battery, I was sentenced to 40 hours community service. With respect to offenses relating to drugs or alcohol, I have been convicted of marijuana possession, as well as DUI. I have been arrested for DUI more than once.

USA Today, p. 1, July 20, 2005.

Unfortunately, the defense did not learn about the "real" Tim Ryan until after the trial had concluded. As such, the defense was deprived of an opportunity to assert a cause challenge, or, alternatively, make an informed peremptory challenge choice.

The district court abused its discretion in its credibility finding relative to Ryan. See *Snyder v.*

Louisiana, ___ U.S. ___, 128 S. Ct. 1203 (2008). The district court accepted Ryan's claim that he had made an "honest mistake" in not disclosing his criminal background. Ryan's explanation that he made an "honest mistake" by failing to disclose his criminal background, however, "limps badly." *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988); see also *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006) (habeas petitioner satisfied first part of test in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), where juror failed to disclose his relationship with co-defendant/prosecution witness). During the *voir dire* in this case, other venire-persons understood the district judge was not asking about only "federal convictions." Indeed, 13 responded. Two disclosed their own arrests – one for a dispute with a neighbor 23 years previous, and the other for a fight, which resulted in a guilty finding and a community service sentence. The remaining jurors recounted relatives' brushes with the law, which ranged from petty (throwing a rock) to serious. One juror disclosed his son's theft conviction. These incidents pale in comparison with Ryan's multiple misdemeanor convictions and felonious conduct. Defts' CTA7 Brief, p. 63.

At the post-trial hearing, Ryan proclaimed that he was impartial; the district court credited that claim. App. 64-65. That was error. It has long been recognized that a juror's claims about impartiality must be taken with a grain of salt. *United States v. Burr*, 25 F.Cas. 49, 50 (D.Va. 1807); see also *Scott*, 854 F.2d at 700 (doubts about bias resolved against jury

service). As stated in Justice O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982):

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

The district court further erred in prejudging the issue, and failing to hold a full hearing into, among other facts, Ryan's inconsistent statements. The district court initially denied the motion, assuming that Ryan's criminal history is "probably going to come back negative." After the district court's prediction proved incorrect, and the court ordered a hearing, the court refused to allow defense counsel to question Ryan directly, or at least have the court ask all questions of Ryan proffered by the defense. By refusing such questioning, the court impeded a recognized vehicle for uncovering his bias. Cf. *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) ("A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.").

Also, before the hearing, the judge telephonically advised Ryan that it was not absolutely necessary to be represented by counsel, signaling that the hearing would not go far. Such advice was curious inasmuch as Ryan would be admitting to felony conduct. Following Ryan's testimony, the district court entertained no argument – even though the government had earlier suggested full briefing. Rather, the district court summarily denied the motion for new trial as an exercise of discretion. App. 62-65; Defts' CTA7 Brief, p. 64.

The Seventh Circuit misapplied *McDonough* in holding that Ryan's past would not have prompted a cause challenge. It is simply incorrect to assume, as the Seventh Circuit did, that a criminal defendant would want a person such as Ryan on the jury. Contrary to the Seventh Circuit's finding, the petitioners, in fact, offered reasons why Ryan would be prejudiced against the defense. As noted in the petitioner's opening brief in the Seventh Circuit:

> Ryan's background made him particularly likely to curry favor with the prosecution by voting to convict. Cf. *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Brooks v. Dretke*, 418 F.3d 430 (5th Cir. 2005), *reh'g denied*, 443 F.3d 328 (2006). Moreover, addicts are notoriously unreliable and lack credibility, e.g., *United States v. Beler*, 20 F.3d 1428, 1432 (7th Cir. 1994), as are individuals with false statement convictions, Fed. R. Evid. 609(a)(1). Given the *USA Today* article reporting that Ryan lied to everyone

> around him, Ryan simply could not be trusted to follow the court's instructions, or make honest credibility determinations. This concern is even more pronounced when one considers Ryan's lies about his past during voir dire.

Defts' CTA7 Brief, p. 62. None of this was discussed in the Seventh Circuit's opinion.

The Seventh Circuit itself has reached inconsistent results. In the aforementioned *Warner/Ryan* case, a divided panel upheld the district court's decision to excuse jurors who had made false statements about their criminal backgrounds during *voir dire*. *Warner*, 498 F.3d at 689; see also *United States v. Warner*, 2006 WL 25823722 (N.D.Ill., Sept. 7, 2006) ("Although neither juror admitted to deliberately omitting their criminal backgrounds from the questionnaire, the court concluded that their responses were not credible in certain respects, and that truthful answers to the questions would have supported excusing them for cause.").

The circuits are also divided. In *United States v. Colombo*, 869 F.2d 149, 151-52 (2nd Cir. 1989), it was alleged that a juror, who wanted to sit on the case, had failed to disclose that her brother-in-law was a government attorney. The Second Circuit found that such conduct, if true, warranted reversal for a new trial in that it obstructed *voir dire* and prevented the defense from knowingly exercising peremptory challenges. The *Colombo* court further found *McDonough*

distinguishable because the case did not involve honest but mistaken responses.

The Ninth Circuit reached a similar result in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc). There, the juror in question failed to disclose that her brother had been murdered, as well as the fact that she had been a frequent burglary victim, in response to a *voir dire* question about whether the juror or any one close to the juror had been a crime victim. (It also turned out that the juror's estranged husband had been accused of a crime and had had contact with the defendant in the jail.) When information about the murder of the defendant's brother was discovered, the trial court held a hearing in which juror claimed that her brother's murder was an "accident" and not a crime. Like the district court here, the trial court found the juror credible. In an opinion written by Judge Kozinski, the Ninth Circuit reversed the district court's denial of habeas corpus. The court stated:

> We don't know why Jessica Freeland so cherished her seat on Dyer's jury. Jury service is a civic duty that citizens are expected to perform willingly when called upon to do so. But there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be

considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.

A juror, like Freeland, who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. There is, of course, the possibility that she did so because of some personal bias against the defendant which she managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror – to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions – with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Id. at 982-83 (footnotes omitted); see also *Conaway*, 453 F.3d at 588 (juror's failure to disclose important information during *voir dire* constitutes evidence of bias); *United States v. Boney*, 977 F.2d 624, 633-35 (D.C. Cir. 1992) ("We think the juror's failure to disclose his status in response to the *voir dire* examination presents serious added concerns. After all, lying or failing to disclose relevant information during *voir dire* itself raises substantial questions about the juror's possible bias.").

Against this, we have the Seventh Circuit's opinion in this case, as well as cases cited by the government in the court below such as *United States v. Uribe*, 890 F.2d 554, 561 (1st Cir. 1989), and *United States v. Currie*, 609 F.2d 1193 (6th Cir. 1979) (per curiam). The foregoing analysis demonstrates that the question in this case is a recurring one of constitutional dimension that is the subject of a circuit split. Furthermore, this case provides this Court with the opportunity to clarify the role of the implied bias standard in the face of juror dishonesty in *voir dire*. As stated by the Fourth Circuit in *Conaway*:

> To be sure, the *Smith* Court declined to presume such bias in a setting where a juror had applied for employment with the prosecutor's office during the defendant's trial, and a hearing disclosed no indication that the juror was, in fact, biased. See 455 U.S. at 212-13, 102 S. Ct. 940. Nothing in the *Smith* decision, however, indicates that the Court intended to discard the doctrine of implied or presumed bias. Indeed, Justice O'Connor

> wrote separately on this point, expressing her "view that the [majority] opinion does not foreclose the use of 'implied bias' in appropriate circumstances," such as a close familial relationship. *Id.* at 221-22, 102 S. Ct. 940 (O'Connor, J., concurring). And in *McDonough*, decided by the Court two years after *Smith,* five Justices wrote or joined concurring opinions emphasizing that the doctrine of implied bias was yet available. See *McDonough,* 464 U.S. at 556-57, 104 S. Ct. 848 (Blackmun, J., concurring, joined by Stevens, J., and O'Connor, J.) (observing that "in exceptional circumstances, [] the facts are such that bias is to be inferred"); *id.* at 558, 104 S. Ct. 848 (Brennan, J., concurring in the judgment, joined by Marshall, J.) (recognizing that "[b]ecause the bias of a juror will rarely be admitted by the juror himself . . . it necessarily must be inferred from surrounding facts and circumstances"); see also Solis v. Crockrell, 342 F.3d 392, 395 n. 6 (5th Cir. 2003) (noting that five Justices in *McDonough* agreed on "vitality" of implied bias doctrine).

453 F.3d at 586-87.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARC W. MARTIN*
*Counsel of Record
MARC MARTIN, LTD.
53 West Jackson Blvd.
Suite 1420
Chicago, IL 60604
(312) 408-1111
Counsel for Petitioner
Ross A. Caputo

SAMUEL ROSENTHAL
CURTIS, MALLET-PREVOST,
COLT & MOSLE, LLP
1200 New Hampshire Ave.
Washington, D.C. 20036
(202) 452-7340
Counsel for Petitioner
Robert Riley

APPENDIX A

517 F.3d 935

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ross A. CAPUTO and Robert M. Riley,
Defendants-Appellants.
Nos. 06-3612, 06-3619.

Argued Sept. 10, 2007.
Decided Feb. 27, 2008.

Gillum Ferguson (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Marc W. Martin (argued), Chicago, IL, Samuel Rosenthal (argued), Curtis, Mallet-Prevost, Colt & Mosle, Daniel J. Popeo, Washington Legal Foundation, Arnon D. Siegel, Washington, DC, for Defendants-Appellants.

Before EASTERBROOK, Chief Judge, and KANNE and EVANS, Circuit Judges.

EASTERBROOK, Chief Judge.

An autoclave sterilizes medical instruments quickly and cheaply. But some instruments can't stand the high temperatures and pressures of an autoclave, so there is a demand for sterilizers that use lower temperatures and non-aqueous sterilants. One system in widespread use relies on ethylene oxide gas as the sterilant. That gas is toxic and hard to handle, however, and Ross Caputo saw a business opportunity in these drawbacks. He designed a low-temperature system using a plasma of peracetic acid

as the sterilant and in 1990 asked the Food and Drug Administration to approve this device, which his company AbTox Inc. called the Plazlyte.

Since 1976 it has been unlawful to sell a new medical device without the FDA's approval. The Medical Device Amendments to the Food, Drug, and Cosmetic Act have a grandfather clause covering devices that had been lawfully sold on or before May 28, 1976, or are "substantially equivalent" to them. 21 U.S.C. § 360c(f)(1)(A)(ii). AbTox asked the FDA to approve sales of a Plazlyte as "substantially equivalent" to units that employ ethylene oxide as the sterilant. We refer to "a" Plazlyte rather than "the" Plazlyte because AbTox made at least two models. The first had an interior volume of one cubic foot and used 10% peracetic acid made by mixing water with a solution of 30% peracetic acid. The water and the 30% solution were in separate bottles. This device used a two-cycle procedure, applying gas plasma twice to sterilize the instruments. The second model had an interior volume of approximately five cubic feet, used 5% peracetic acid from a single bottle (no dilution with water from a second bottle), and ran just one cycle, at a different pressure from the first model. We call the first model the small Plazlyte and the second model the large Plazlyte.

AbTox submitted the small Plazlyte for approval in 1990. It also submitted only those tests that favored the device's effectiveness; others, less helpful to AbTox, were concealed (or so a jury could conclude; we recount the evidence in the light most favorable to

the verdict). The agency's staff doubted whether the Plazlyte was equivalent to ethylene oxide systems and insisted on limiting the uses to which it could be put. When the FDA signed off on the small Plazlyte in 1994, it approved the device only for use with solid stainless-steel instruments. If AbTox wanted to sell the Plazlyte to sterilize instruments containing interior space that the gas plasma might not fully penetrate (such as those with hinges or lumens) or instruments made from materials that might react chemically with peracetic acid ($C_2H_4O_3$), an organic peroxide, it had to file an application for approval as a new device rather than one equivalent to a grandfathered device. Any medical instrument containing plastic, solder (usually made of lead, tin, or silver), or brass (an alloy of copper and zinc) was outside the scope of the FDA's approval.

A new and expensive machine (Plazlytes sold for about $100,000) for sterilizing solid instruments made of stainless steel had no prospect in the market. Autoclaves are cheaper and don't require the handling of acids. Caputo understood that AbTox would never be able to sell a single unit of the small Plazlyte for the limited use approved by the FDA. Caputo (and his assistant Robert Riley) did not try. Instead they immediately began promoting the large Plazlyte as a replacement for ethylene-oxide devices, and thus as suitable for general-purpose sterilization. It had begun selling the large Plazlyte outside the United States in 1993; thus, long before receiving the FDA's approval to sell the small Plazlyte, it knew that the

small device would never be marketed and that the large Plazlyte would be promoted for use with many kinds of instruments – though it did not tell the FDA these things when negotiating the details of the limited use that would be allowed to the small Plazlyte.

Problems ensued when some hospitals used the Plazlyte to sterilize brass instruments employed for procedures in the eye. The Plazlyte left a blue-green residue on some of these instruments – and, although the instruments were sterile, the residue (copper and zinc acetate) was harmful to patients' eyes. Some patients experienced corneal decompensation, a severe condition that entails loss of vision.

In May 1995 the FDA found out what AbTox was telling customers and reminded it about the limitations on the scope of approval. This notice informed AbTox that the Plazlyte as promoted was "misbranded". AbTox then sought the FDA's approval to sell the large Plazlyte to sterilize a wider class of instruments; when the FDA rejected AbTox's request for expedited decision and told AbTox that it "may not market this device until you have received a letter from the FDA allowing you to do so", AbTox went on promoting the large Plazlyte as before. On September 27, 1996, the FDA sent AbTox another instruction to stop selling the large Plazlyte; AbTox failed to comply (though it did not tell the FDA so). The agency never authorized AbTox to sell the large Plazlyte for any use.

The Centers for Disease Control opened an investigation to discover what was causing the eye injuries. Meanwhile, in January 1998, the FDA inspected AbTox's facilities and discovered that it was still selling the large Plazlyte. The inspectors told AbTox to desist; it didn't. In April 1998 the FDA issued a warning to all hospitals, telling them that the large Plazlyte was not an approved device and at all events must not be used with any instruments containing solder, copper, or zinc, or for any ophthalmic instruments. The FDA directed AbTox to recall the devices; U.S. marshals seized its inventory; this criminal prosecution eventually followed.

The prosecutor threw the book at Caputo and Riley. The indictment charged them with conspiring to defraud the United States, 18 U.S.C. § 371, mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, lying to federal agents, 18 U.S.C. § 1001, and the delivery of misbranded devices, 21 U.S.C. §§ 331(a) and 333(a)(1). A jury convicted them of these charges after an eight-week trial. Caputo has been sentenced to 120 months' imprisonment and Riley to 72 months. Both were ordered to make restitution of $17.2 million, the list price of all Plazlyte units ever sold.

Defendants' lead argument is that the Food, Drug, and Cosmetic Act violates the first amendment by restricting promotional materials to those uses that the FDA has approved. The argument starts from the premise that federal law allows customers of any approved medical device or drug to put it to any use that the customer sees fit. These "off-label uses"

being lawful, the argument goes, it must also be lawful to tell customers about them.

Until the last 30 years, such an argument would have been laughed out of court. *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), had held that "commercial speech" – that is, speech promoting a product for sale – is not part of the "freedom of speech" as that term was understood in 1789. But the Court overruled *Valentine* in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), holding that the government cannot regulate by ensuring ignorance among consumers. If it is lawful to sell a product then, the Court held, it must be lawful to inform consumers that the product is available to buy. Consumers themselves must decide what to do; the Constitution forecloses an enforced ignorance based on a paternalistic view that informed consumers will make mistakes. *See also, e.g., Greater New Orleans Broadcasting Ass'n, Inc. v. United States,* 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); R.H. Coase, *Advertising and Free Speech,* 6 J. Legal Studies 1 (1977).

For a time judges thought the Supreme Court's new understanding inapplicable to drugs (and, by implication, medical devices): Federal law allows vendors to tell customers about all lawfully available

drugs and devices, after all, and thus avoids the precise problem presented by *Virginia Citizens Consumer Council.* But federal law *does* prohibit manufacturers from alerting consumers to lawful off-label uses, and *Thompson v. Western States Medical Center,* 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), held that this limit is unconstitutional in at least some applications. A federal law allowed pharmacists to compound some drugs that had been approved for stand-alone sales, creating substances that had not been subjected to the normal testing. The legislation granting pharmacists this compounding privilege attached conditions to the way they could promote the compounded drugs. The Court held these limits unconstitutional: if the compounded drug could be sold, the Court held, then it could be freely promoted for every lawful use. *Western States Medical Center* establishes that drugs are not a special case for first-amendment analysis. (The Court once held that gambling is a special case, *see Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), but the status of that rule is doubtful. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 508-14, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion).) The Court suggested in *Western States Medical* that Congress either adopt a substantive rule prohibiting compounding (or, here, prohibiting off-label uses) or allow the FDA to supply warnings via its own speech. Compelling private persons to toe the government's line, or shut up, is unconstitutional, the Court held.

This is the doctrine that Caputo and Riley propose to invoke in their defense.

Whether *Virginia Citizens Consumer Council* and *Western States Medical Center* apply to promotion by a product's manufacturer, which struck a bargain with the FDA in the approval process by promising to limit its promotion – a bargain that the private litigants in the earlier cases had not struck – is a difficult question. The doctrine of unconstitutional conditions places limits on the promises that an agency may extract from those who seek approval. And if a given use is lawful, and thus can be written about freely in newspapers or blogs, and discussed among hospitals that already have purchased a Plazlyte, doesn't it make a good deal of sense to allow speech by the device's manufacturer, which after all will have the best information? Why privilege speech by the uninformed? The manufacturer has an incentive to slant the speech in its favor and may withhold bad news, but many listeners (especially professionals such as physicians) understand this and can discount appropriately. That, at any rate, is the anti-paternalist view of *Virginia Citizens Consumer Council* and the cases that followed in its wake.

Yet if a manufacturer's promise to the FDA to avoid speech about off-label uses is unenforceable, the FDA may respond by withholding any approval of drugs or devices that have questionable additional uses. AbTox's small Plazlyte would not have been approved at all, had the FDA anticipated that approval would enable AbTox to tout it (or its larger

brother) for use with brass ophthalmic instruments. Other firms, with no desire to promote off-label uses (or, at least, no desire to pay for the expensive tests needed to persuade the FDA to sanction wider use), would be made worse off by their inability to strike deals allowing the FDA to approve a subset of all possible uses. Consumers who could benefit from drugs or devices that would be excluded from the market by the FDA's response to a broad privilege to tout off-label uses also would be made worse off. Doubtless the first amendment differs from Bentham's felicific calculus, but a court should hesitate before extending an a historical reading of the Constitution in a way that injures the very audience that is supposed to benefit from free speech.

Fortunately, we need not decide today whether a seller of drugs or medical devices has a constitutional right to promote off-label uses. *Virginia Citizens Consumer Council* and its successors rest on the assumption that the law allows the activity that the speaker seeks to promote. Here that assumption holds only if AbTox lawfully could sell the large Plazlyte for the (approved) use with solid stainless-steel instruments. Unless the machine itself could be sold lawfully, there were no lawful off-label uses to promote. And the jury found, by its verdicts on both the fraud-on-the-United-States count and the misbranded-device counts, that the large Plazlyte could *not* lawfully be sold. The jury concluded not only that Caputo and Riley had lied to the agency when seeking approval of the small Plazlyte but also that the large

Plazlyte differed enough from the small one that new approval was essential. For current purposes it is enough to concentrate on the latter conclusion. (Defendants insisted at oral argument that the jury could have convicted, under the instructions given, without finding either lies to the FDA or sale of a never-approved device. We have reviewed the instructions and conclude that, to convict on all counts as it did, the jury had to find both.)

Once the FDA certifies a medical device under the grandfather clause, the seller may make modifications to that device without obtaining fresh approval. The line between a "modification" (no approval needed) and a new device (which must be submitted independently for approval) is drawn in 21 C.F.R. § 807.81. There are two principal inquiries: first, whether the changes "significantly affect the safety or effectiveness of the device" and, second, whether there is a "major change or modification in the intended use of the device." 21 C.F.R. § 807.81(a)(3). We doubt that the large Plazlyte could be described as a "modification" of the small one; recall that the large device had been placed on sale outside the United States in 1993, the year before the FDA approved the small device. "Modification" suggests a change in an approved device, not a different device that was already on sale before the approval. But suppose that this is wrong, and suppose further that the large Plazlyte was as safe as the small one notwithstanding the difference in the concentration and number of applications of the sterilant. There

remains the rule that a "major change or modification in the intended use of the device" requires fresh approval. Promoting the large Plazlyte as suitable for use with all medical instruments is a major change in intended use, compared with using it for solid stainless-steel instruments alone. This expansion of use caused the copper and zinc acetates that injured patients. So the large Plazlyte, with its expanded "intended use", was not covered by the FDA's approval of the small Plazlyte and could not lawfully be sold *at all.* That knocks out the premise of *Virginia Citizens Consumer Council* and similar cases. There was no lawful activity for speech to promote.

Caputo and Riley try to avoid this conclusion by arguing that the Due Process Clause of the fifth amendment disabled the FDA from keeping the large Plazlyte off the market. The line between new and modified devices is too vague to be enforceable, the argument goes. We grant that phrases such as "significantly affect" and "major change . . . in the intended use" are not self-defining. But then no legal phrase is. Think of "material" (as in "material misrepresentations are forbidden"), a staple of legal discourse, or "unreasonable" (as in "unreasonable danger to the health and safety of park users", a phrase deemed adequately specific in *Thomas v. Chicago Park District,* 534 U.S. 316, 324, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002)). The Supreme Court has rejected vagueness challenges to the antitrust laws, *see Nash v. United States,* 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (1913), which must be an order of

magnitude more ambulatory than § 807.81(a)(3), and has held that a rule cannot be deemed unconstitutionally vague if it suggests a metric for decision. *See United States v. Powell,* 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). Section 807.81(a)(3) tells us what dimensions of difference matter, even though it does not give an exact answer to the question "how much is too much"? (The statute in *Powell,* which forbade the mailing of a firearm capable of being concealed on the person, also omitted a quantitative rule, but the Court held that its qualitative approach suffices.)

The uncertainty that is inevitable in legal standards (as opposed to numerical rules) often is offset by notice, so that people need not guess what is required of them. The FDA gave AbTox notice, and to spare. It published in March 1993 (before the small Plazlyte was approved) a "Guidance" stating that any change in the sterilant or chamber size of a sterilizer creates a new device that requires new approval. It sent letters, which AbTox ignored. (The letters not only called attention to the 1993 Guidance but also restated the FDA's view of AbTox's duties under the statute and regulation.) It sent an inspection team, whose directions AbTox spurned. There was no such notice in *United States v. Prigmore,* 243 F.3d 1 (1st Cir.2001), a decision on which defendants heavily rely. (And *Prigmore* did not hold the statute or regulations unconstitutionally vague, either, though it did remand for a new trial with jury instructions adequate to pin down the meaning of the rules at issue there.)

To say that the FDA showered interpretations and advice on Caputo and Riley is not to say that the published "Guidance" has the effect of a regulation, let alone that AbTox was legally bound to comply with the letters. Only the statute, regulations, and formal directives of the agency (as opposed to its staff) have legal force. The agency did not issue its cease-and-desist and recall orders until April 1998. Until then Caputo and Riley were at liberty to chart their own course, as their own legal advisers counseled them. When they did this, however, they took a risk and could not then say "we didn't know" or "the regulation left us scratching our heads." The agency comprehensively alerted AbTox, Caputo, and Riley to its view of their legal obligations, and an agency's interpretation of its own regulations, no less than a judicial opinion, may disambiguate them. When Caputo and Riley chose to go their own way, the question on the table for the court became simply who is right about the meaning of the legal rules, not whether adequate notice was given.

Note that Caputo and Riley have not made an advice-of-counsel defense, though no one gets into a multi-million-dollar medical-device business without legal counsel. Perhaps they lied to their lawyers about what they were doing and thus cannot present a defense that depends on candor to counsel; or perhaps they decided to avoid asking for advice about § 807.81(a)(3) for fear of what the answer would be; finally, they may have asked and received a reply that

they did not follow. The attorney-client privilege prevents us from knowing which.

Defendants did, however, argue that they acted "in good faith." They complain about the adequacy of the instructions on this subject. That the district judge gave any such instruction at all was unduly favorable to the defense. This was at heart a fraud prosecution (and for most counts nothing but a fraud prosecution), and there is no "good faith defense" to fraud. A person who tells a material lie to a federal agency can't say "yes, but I thought it would all work out to the good" or some such thing. Intentional deceit on a material issue is a crime, whether or not the defendant thought that he had a good excuse for trying to deceive the federal agency or the potential customers.

The district judge did not abuse his discretion – the right standard, *see General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) – in keeping out of evidence the proposed "expert" testimony that defendants wanted to introduce. The "expert" would have testified about the meaning of the statute and regulations. That's a subject for the court, not for testimonial experts. *See Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 900 (7th Cir.1994). The only legal expert in a federal courtroom is the judge. An advice-of-counsel defense might have got something along these lines in through the back door, but as we have explained no such defense was made.

It came out after the trial that the jury's foreman had six misdemeanor convictions related to his use of heroin and alcohol, to which he had been addicted. The district judge held a hearing and concluded that this juror had believed that questions asking the venire whether anyone had been convicted of a crime sought information about federal crimes only, and he had not been convicted of a federal crime. The judge credited that explanation, found that the juror had committed an "honest mistake," and added that, had the juror revealed his convictions, they would not have supported a challenge for cause. The juror testified, and the judge found, that he had broken his heroin addiction through a methadone program, had been "clean" for a year before trial, and had been forthright about his problems when asked; it was a newspaper report, based on that candor, that led to the discovery after the end of the trial. The district judge applied the right legal standard, *see McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984); *United States v. Warner,* 498 F.3d 666, 684-88 (7th Cir.2007), and did not abuse his discretion in concluding that defendants are not entitled to a new trial. After all, it is usually the prosecutor who wants to excuse potential jurors with criminal records, lest they sympathize unduly with others facing the ordeal of a prosecution and at risk of imprisonment. Caputo and Riley do not give any reason for thinking that this juror would have been slanted in the prosecutor's favor.

Riley contends that his conviction on Count 9, which charged him with making two false statements to an employee of the FDA, in violation of 18 U.S.C. § 1001, should be reversed because the instructions allowed the jury to convict if either of two statements was false, while the evidence shows that one statement at most was false. As a matter of law, one false statement is enough for a conviction, so Riley's line of argument fails under *Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), which holds that a conviction is proper if the evidence established beyond a reasonable doubt any of the ways in which the crime might have been committed. *Griffin* holds that a jury may be relied on to accept the supported possibility and discard the unsupported one. (When the instruction contains a legal error, then the jury's fact-finding ability may lead it astray, but Riley does not contend that the instruction allowed the jury to convict him on Count 9 on a factually substantiated but legally incorrect theory.)

A brief discussion of sentencing brings this opinion to a close. The district court calculated the loss at roughly $17 million, the list price for all Plazlyte devices that AbTox delivered. Application Note 3(F)(v) to U.S.S.G. § 2B1.1 says that defendants who sell goods without required approvals receive no credit for their value, if any, to the customers. List price thus was the right starting point. Defendants say, however, that some machines were sold at a discount and a few given away as demonstrators, and that the judge should have used actual transactions

prices rather than list prices. That's true in principle, but defendants don't say that using transactions prices would have reduced the loss below $7 million. A loss from $7 million through $20 million produces the same offense level; there's accordingly no need to determine with precision where within that span the loss falls. (Despite *United States v. Demaree,* 459 F.3d 791 (7th Cir.2006), which was released a month before defendants were sentenced and holds that judges must use the Guidelines in force on the date of sentencing, the district judge used the 1997 version in which loss from $10 million through $20 million produced the same number of levels. That error was favorable to defendants, and as the prosecutor has not taken a cross-appeal we need not discuss it further.)

Finding actual transactions prices was unnecessary to know the "loss" for the purpose of § 2B1.1, which does not require more than an estimate. Restitution, by contrast, requires an exact figure; it is a substitute for civil damages, though limited to direct losses rather than consequential damages. *See United States v. Behrman,* 235 F.3d 1049 (7th Cir.2000); *United States v. Havens,* 424 F.3d 535, 537 (7th Cir.2005). So the restitution for a Plazlyte with a list price of $100,000 but sold at a $20,000 discount is $80,000, not $100,000. And the restitution for a machine given away as a demonstrator is nothing. Likewise restitution for a machine that was invoiced at $100,000, but never paid for in light of the recall (defendants say that there were several in this

category), is zero. The district court must determine these figures one customer at a time and not use the list-price shortcut that is suitable when the only question is whether loss falls within widely spaced bounds.

Defendants propose a further adjustment for the value the buyers obtained from the Plazlyte sterilizers. Some hospitals may have used them principally for the approved purpose and found them entirely satisfactory; others may have put them to off-label uses that did not cause problems. But if a court is going to deduct for the value of the machines in use, it should order restitution for the cost of compensating injured patients, the cost to hospitals and the Centers for Disease Control of investigating the mysterious eye injuries, and so on; one can't have the subtractions for productive use without the additions for harms caused by off-label uses. Defendants do not propose to make restitution for these harms, so they can't obtain subtractions either.

There remains one problem: What of the machines that remained in service after the recall? A recall notice is (from a customer's perspective) an option rather than a command. Some hospitals returned their Plazlyte machines; others junked them; but a few kept them and continued using them, even purchasing extra sterilant from AbTox to extend their lives. (The FDA allowed AbTox to sell the peracetic acid to hospitals that certified their awareness of the recall and the reasons behind it.) These customers

evidently believed that the machines were valuable – and, if hospitals took care to avoid certain kinds of instruments, they continued to be safe. We think that no restitution is owed to customers that, with full knowledge, continued to operate Plazlyte machines for longer than was necessary to replace them. (Hospitals that retained the Plazlyte sterilizers only until they could secure new, approved equipment should be grouped with hospitals that returned them in the recall.) In principle hospitals that kept their machines in long-term service are entitled to compensation for a reduction in the value that Plazlyte sterilizers would have on resale (not only because of the blow to their reputation but also because spare parts will be hard to come by), but unless that value (or its proxy, the reduction in the machines' expected useful lives) can be determined, the judge should assume that the hospitals that kept their Plazlyte machines for more than a year after the recall notice will use them until they wear out.

The judgment of the district court is affirmed except with respect to restitution. The award of restitution is vacated and the case remanded for calculation, using the principles in this opinion, of the amount that defendants owe to each of AbTox's customers.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

Ross A. Caputo

JUDGMENT IN A CRIMINAL CASE

Case Number: 03 CR 126-1

USM Number: 15799-424

James M. Cole
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) One through Eight and Twelve through Eighteen of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 371	Conspiracy to Defraud the U.S.	July, 1998	1
18 U.S.C. §§1341 and 2	Mail Fraud	July, 1998	2, 3, 4, 5
18 U.S.C. §§1343 and 2	Wire Fraud	July, 1998	6, 7, 8

21 U.S.C. §§331(a) and 333(a)(1)	Introduction and Delivery for Introduction of a Misbranded	July, 1998	12 through 18

The defendant is sentenced as provided pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)___

■ Count(s) any remaining ☐ is ■ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 13, 2006
Date of Imposition of Judgment

/s/ Ruben Castillo
Signature of Judge

Ruben Castillo – U.S. District Judge
Name and Title of Judge

September 27, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

60 Months on Count One, 120 months on Counts Two through Eight, and 12 months on counts Twelve through Eighteen, all terms to run concurrent, for a total of 120 months.

- ■ The court makes the following recommendations to the Bureau of Prisons:

  That the defendant be placed at Oxford, Wisconsin.

  Defendant shall participate in an alcohol abuse treatment program.

- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
  - ☐ at _____ ☐ a.m. ☐ p.m. on _____.
  - ☐ as notified by the United States Marshal.
- ■ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ■ before 2 p.m. on 10/23/2006.
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three years on Counts One through Eight, One year on Counts Twelve through Eighteen, all terms to run concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15

days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

■ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and random drug tests thereafter, conducted by the U.S. Probation Office, not to exceed 104 tests per year.

The defendant will participate in an alcohol treatment program at the direction of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$975**	**$**	**$17,209,074.50**

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
See Attached Distribution of Restitution (23 pages)			
TOTALS	$ 17,209,074.50	$ 17,209,074.50	

☐ Restitution amount ordered pursuant to plea _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

U.S. v. Ross Caputo and Robert Riley
03 CR 126-1,2
DISTRIBUTION OF RESTITUTION

Joan Gabriel, Comptroller
ARIZONA HEART HOSPITAL
1930 E. Thomas Road
Phoenix, AZ 85016
Reference: ABTOX Sterilizer Case Restitution
Loss: $109,000.00

ARKANSAS HEART HOSPITAL
1701 South Shackleford Road
Little Rock, AR 72211
Reference: #590 Materials Management
Loss: $110,000.00

David Wright
Legal Counsel
NORTH SHORE MEDICAL CENTER
formerly Atlanticare Medical Center
81 Highland Avenue
Salem, MA 01970
Reference: ABTOX Sterilizer Case Restitution
Loss: $97,500.00

BAPTIST HEALTH
formerly Baptist Medical Center
Attention: Legal Department
P.O. Box 244001
Montgomery, AL 36124-4001
Reference: ABTOX Sterilizer Case Restitution
Loss: $97,500.00

BARTLETT MEMORIAL HOSPITAL
3260 Hospital Drive
Juneau, AK 99801
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Robert M. Simpson
Vice President Finance/CFO
BAYLOR RICHARDSON MEDICAL CENTER
401 West Campbell Road
Richardson, TX 75080
Reference: ABTOX Sterilizer Case Restitution
Loss: $92,000.00

Yvonne Bell
Administration
MONARC BENEFIS HEALTHCARE EAST CAMPUS
formerly Benefis West Columbus Hospital
1101 26th Avenue South
Great Falls, MT 59405
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

ADVOCATE BETHANY HOSPITAL
3435 West Van Buren Street
Chicago, IL 60624
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

In reference to the following hospitals:

ALTON MEMORIAL; BARNES-JEWISH; CHRISTIAN HOSPITAL NORTHEAST & NORTHWEST; MISSOURI BAPTIST

Send restitution to:
Angela Standish
Mail Stop 90-94-208
600 South Taylor, Suite 154
St. Louis, MO 63110
Reference: ABTOX Sterilizer Case Restitution
Loss: $848,000.00

SPECTRUM HEALTH-BLODGETT CAMPUS
formerly Blodgett Memorial Hospital
Attention: Legal Department
100 Michigan N.E.
MC05
Grand Rapids, MI 49503
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Craig Ames
President and Chief Executive Officer
BRYAN LGH MEDICAL CENTER
formerly Bryan Memorial Hospital
1600 South 48th Street
Lincoln, NE 68506-1299
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

David Burlage
Associate Counsel
CENTRAL IOWA HOSPITAL CORPORATION
d/b/a Iowa Methodist Medical Center
1515 Lynden Street
Des Moines, IA 50309
Reference: ABTOX Sterilizer Case Restitution
Loss: $204,000.00

CENTRAL WASHINGTON HOSPITAL
P.O. Box 1887
Wnatchee, WA 98807
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

Dina Mohler
Office of the General Counsel
CHARLESTON AREA MEDICAL CENTER, INC.
(General; Memorial)
501 Morris Street
Charleston, WV 25301
Reference: ABTOX Sterilizer Case Restitution
Loss: $300,000.00

CHESAPEAKE GENERAL HOSPITAL
Attention: Maralyn Spittler
736 Battlefield Boulevard North
Chesapeake, VA 23320
Reference: ABTOX Sterilizer Case Restitution
Loss: $209,825.00

Ann Long
Legal Affairs Department
CHILDREN'S MEDICAL CENTER OF DALLAS
formerly Children's Hospital
1935 Motor Street
Dallas, TX 75235
Reference: U.S. v. Ross Caputo, et al.
Loss: $105,000.00

Robert E. Ward
COMMUNITY REGIONAL MEDICAL CENTER
formerly Clovis Community Hospital
P.O. Box 1232
Fresno, California 93715
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

CARONDELET HEALTH SYSTEM
(re: Daniel Freeman Memorial Hospital)
Attn. Ed Engesser
11 Goldenshore, Suite 360
Long Beach, CA 90802
Loss: $105,000.00

DEACONESS Hospital
311 Straight Street
Cincinnati, OH 45219
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Compliance Officer
BOZEMAN DEACONESS HOSPITAL
915 Highland Boulevard
Bozeman, MT 59715-6999
Reference: U.S. v. Ross Caputo, et al.
(ABTOX Sterilizer Case Restitution)
Loss: $100,000.00

Larry Laux
Chief Financial Officer
EMPIRE HEALTH SERVICES
DEACONESS MEDICAL CENTER
800 West 5th Avenue
Spokane, WA 99204-2803
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case Restitution)
Loss: $325,000.00

Alan Hall
In-House Counsel
BILLINGS CLINIC
formerly Deaconess Medical Center
2800 10th Avenue North
Billings, MT 59101
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case Restitution)
Loss: $112,000.00

William F. Rochefort
Corporate Vice President, Finance and Accounting
DETROIT MEDICAL CENTER
3663 Woodward Avenue
Suite 200
Detroit, MI 48201
Reference: ABTOX Sterilizer Case Restitution
Loss: $99,825.00

Ruth Otto
c/o Central Service
BAPTIST HEALTH DOCTOR'S HOSPITAL
formerly Doctor's Hospital Health South
Department 350-4700
5000 University Drive
Coral Gables, FL 33146
Reference: ABTOX Sterilizer Case Restitution
Loss: $103,865.00

ELMENDORF AIR FORCE BASE
10480 22nd Street
Elmendorf AFB, AK 99506
Reference: ABTOX Sterilizer Case Restitution
(U.S. v. Ross Caputo, et al.)
Loss: $92,000 00

Nancy Whitmire
Director of Purchasing
FLAGLER HOSPITAL
400 Health Park Boulevard
St. Augustine, FL 32086
Reference: ABTOX Sterilizer Case Restitution
Loss: $108,000.00

Becky Stevenson
Risk Manager
FLOWER HOSPITAL
5200 Harroun Road
Sylvania, OH 43560
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Robert Ward
Chief Legal Officer
COMMUNITY MEDICAL CENTER, INC.
formerly Fresno Community Hospital
P.O. Box 1232
Fresno, CA 93715-1232
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

GADSEN REGIONAL MEDICAL CENTER
1007 Goodyear Avenue
Gadsden, AL 35903
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $115,000.00

GERALD CHAMPION REGIONAL MEDICAL CENTER
formerly Gerald Champion Memorial Hospital
2669 North Scenic Drive
Alamogordo, NM 88310
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

Sherri Graeber
Comptroller
GOOD SAMARITAN HOSPITAL
2425 Samaritan Drive
San Jose, CA 95124
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Restitution)
Loss: $60,000.00

GOOD SAMARITAN HOSPITAL
Administration
520 South 7th Street
Vincennes, IN 47591
Reference: ABTOX Sterilizer Case Restitution
Loss: $97,500.00

Kathy Blue
Legal Department
ADVOCATE HEALTH and HOSPITALS CORPORATION
d/b/a Good Samaritan Hospital
2025 Windsor Drive
Oak Brook, IL 60523
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

Geoff Walker
Office of the General Counsel
PREMIER HEALTH PARTNERS
re: Good Samaritan Hospital
40 West 4th Street
Suite 1800
Dayton, OH 45402
Reference: ABTOX Sterilizer Case Restitution for Good Samaritan Hospital
Loss: $106,000.00

Michael C. Ruger
Director of Risk Management and Corporate Compliance
GOOD SAMARITAN HOSPITAL
419 15th Avenue S.E.
Puyallup, WA 98371-0192
Reference: U.S. v. Ross Caputo, et al.
Loss: $96,000.00

Thomas L. Eure
General Counsel
GRACE HOSPITAL
2201 South Sterling Street
Morganton, NC 28655
Reference: ABTOX Sterilizer Case Restitution
Loss: $99,900.00

GRANDVIEW HOSPITAL AND MEDICAL CENTER
405 Grand Avenue
Dayton, OH 45405
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case) Restitution
Loss: $109,000.00

Leigh Kerr
Purchasing Department
GROUP HEALTH COOPERATIVE
12400 E. Marginal Way South
Tukwila, WA 98168-2559
Reference: Plasma Sterilizer Restitution
Loss: $99,825.00

Tom Ryan
GUADALUPE REGIONAL MEDICAL CENTER
formerly Guadalupe Valley Hospital
1215 East Court
Seguin, TX 78155
Reference: ABTOX Sterilizer Case Restitution
Loss: $25,000.00

Lore Mitchell
Chief Financial Officer
HARBORVIEW MEDICAL CENTER
325 9th Avenue
Seattle, WA 98104
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Karen Carlee
Legal Department
HEALTH SOUTH CORPORATION
One Health South Parkway
Birmingham, AL 35243
Reference: ABTOX Sterilizer Case Restitution
(Health South Medical Center)
Loss: $207,730.00

MEMORIAL HERMANN HOSPITAL
Legal Department
6411 Fannin
Houston, TX 77030
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

Pat Andrews
HOLLAND COMMUNITY HOSPITAL
602 Michigan Avenue
Holland, MI 49423
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Bob Welsh
Risk Management
HOLY ROSARY MEDICAL CENTER
351 Southwest 9th Street
Ontario, OR 97914
Reference: ABTOX Sterilizer Case Restitution
Loss: $92,000.00

Dr. Cameron
SANTA FE INDIAN HOSPITAL
formerly Indian Hospital – U.S. Public Health Service
1700 Cerrillos Road
Santa Fe, NM 87505
Reference: ABTOX Sterilizer Case Restitution
Loss: $113,000.00

INDIANA UNIVERSITY HOSPITAL
Risk Management
550 University Blvd.
Indianapolis, IN 46202
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case) Restitution
Loss: $110,000.00

Louise Samuel
KAISER FOUNDATION HOSPITAL
711 Kapolani Boulevard
Honolulu, HI 96813
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

KAISER PERMANENTE
1150 Veterans Boulevard
Redwood City, CA 94063
Reference: ABTOX Sterilizer Case Restitution (U.S. Ross Caputo, et al.)
Loss: $115,000.00

Richard Paulus
Director
Risk Management
LAKE FOREST HOSPITAL
660 Westmoreland Road
Lake Forest, IL 60045
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Jeff Jones
Compliance Officer
LOURDES HOSPITAL
1530 Lone Oak Road
Paducah, KY 42003
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

LYNCHBURG GENERAL HOSPITAL
1901 Tate Springs Road
Lynchburg, VA 24501-1109
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case) Restitution
Loss: $115,000.00

MARTHA JEFFERSON HOSPITAL
459 Locust Avenue
Charlottesville, VA 22902-4808
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case) Restitution
Loss: $100,000.00

Kimberly Russell
President and Chief Executive Officer
MARY GREELEY MEDICAL CENTER
1111 Duff Avenue
Ames, IA 50010
Reference: ABTOX Sterilizer Case Restitution
Loss: $99,825.00

MASSACHUSETTS GENERAL HOSPITAL
Office of the General Counsel
55 Fruit Street
Boston, MA 02114
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case) Restitution
Loss: $50,000.00

Christie Valdez
Risk Management Coordinator
MCALLEN MEDICAL CENTER
MCALLEN HEART HOSPITAL
301 West Expressway 83
McAllen, TX 78503
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case Restitution)
Loss: $230,000.00

Penny Rollins
Director
Risk Management
MCKEE MEDICAL CENTER
2000 Boise Avenue
Loveland, CO
Reference: ABTOX Sterilizer Case Restitution
Loss: $97,500.00

Patrice Stark
Vice President, Quality Management
MCKENNA MEMORIAL HOSPITAL
600 North Union Avenue
New Braunfels, TX 78130
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Chris Specht
Director, Risk Management
AVERA MCKENNAN HOSPITAL
P.O. Box 38
Yankton, SD 57078
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Robert Abernethy
CSO – Administration
MEDICAL CENTER HOSPITAL
500 West 4th Street
Odessa, TX 79761
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

MEMORIAL HOSPITAL
Department of Risk Management
111 Brewster Street
Pawtucket, RI 02860
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Michelle Robbins
Director, Materials Management
FLORIDA HOSPITAL MEMORIAL SYSTEM
formerly Memorial Hospital
875 Sterthaus Avenue
Ormond Beach, FL 32174
Reference: ABTOX Sterilizer Case Restitution
Loss: $105,000.00

Jeff Costello
Chief Financial Officer
MEMORIAL HOSPITAL OF SOUTH BEND
615 N. Michigan Street
South Bend, IN 46601
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Dianne Gomez
Director, Risk Management
MEMORIAL MEDICAL CENTER
2450 S. Telshor Boulevard
Las Cruces, NM 88011
Reference: ABTOX Sterilizer Case Restitution
Loss: $100,400.00

MEMORIAL MISSION HOSPITALS, INC.
c/o Legal Services
509 Biltmore Avenue
Asheville, NC 28801-4601
Reference: ABTOX Sterilizer Case Restitution
(U.S. v. Ross Caputo, et al.)
Loss: $115,000.00

Mary Weiser
Legal Department
MEMORIAL SLOAN KETTERING HOSPITAL
1275 York Avenue
New York, NY 10021-6094
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

Julie Erikson, Risk Management
MERCY GENERAL HOSPITAL
1500 East Sherman Boulevard
Muskegon, MI 49444
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Karen Gill, Risk Management
MERCY HOSPITAL TIFFIN
485 West Market Street
Tiffin, OH 44883
Reference: ABTOX Sterilizer Case Restitution
Loss: $106,000.00

Dr. Brenda Phelan
Risk Management
MERCY MEDICAL CENTER
formerly Mercy Hospital
1512 12th Avenue Road South
Nampa, ID 83686-2834
Reference: ABTOX Sterilizer Case Restitution
Loss: $103,000.00

MERCY MEDICAL CENTER
Legal Department
2175 Rosaline Avenue
Redding, CA 96001
Reference: ABTOX Sterilizer Case Restitution
Loss: $100,000.00

MISSION HOSPITAL
d/b/a MISSION REGIONAL MEDICAL CENTER
900 S. Bryan Road
Mission, TX 78572
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Connie Prewitt
Chief Financial Officer
MONTROSE MEMORIAL HOSPITAL
800 South 3rd Street
Montrose, CO 81401
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

Alicia Raush
President's Office
MOUNT CARMEL WEST
formerly Mount Carmel Medical Center
793 West State Street
Columbus, OH 43222
Reference: ABTOX Sterilizer Case Restitution
Loss: $97,500.00

MOUNT CLEMENS GENERAL HOSPITAL
Risk Management Department
1000 Harrington Boulevard
Mount Clemens, MI 48043
Reference: ABTOX Sterilizer Case Restitution
(U.S. v. Ross Caputo, et al.)
Loss: $115,000.00

NAVAL HOSPITAL
3600 Rivers Avenue
Charleston, SC 29405
Reference: ABTOX Sterilizer Case Restitution
Loss: $99,900.00

Captain Jonathan P. Cutting
Commanding Officer
U.S. NAVAL HOSPITAL ROTA
PSC 819, Box 18
FPO, AE 09645-0018
Loss: $92,000.00

NAVAL HOSPITAL CAMP LEJUNE
100 Brewster Boulevard
Camp LeJune, NC 28547
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $99,900.00

Lori Freezor
Vice President, Legal Affairs
NEW HANOVER REGIONAL MEDICAL CENTER AND OFFICES
P.O. Box 9000
Wilmington, NC 28402-9000
Loss: $96,000.00

NORMAN REGIONAL HOSPITAL
P.O. Box 1308
Norman, OK 73071
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $215,000.00

J. McLain Wallace, Jr.
Vice President, Legal Affairs
NORTH CAROLINA BAPTIST HOSPITAL
Corporate Compliance Office
Medical Center Boulevard
Winston-Salem, NC 27157
Reference: ABTOX Sterilizer Case Restitution
Loss: $95,000.00

Gary Duncan
Director Materials Management
PONTIAC GENERAL HOSPITAL
d/b/a NORTH OAKLAND MEDICAL CENTER
461 West Huron
Pontiac, MI 48341
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Gloria Ybarra
Director, Risk Management
NORTH COLORADO MEDICAL CENTER
1801 16th Street
Greeley, Co 80631
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

NORTHRIDGE HOSPITAL MEDICAL CENTER
18300 Roscoe Boulevard
Northridge, CA 91325-4167
Reference: ABTOX Sterilizer Case Restitution
(U.S. v. Ross Caputo, et al.)
Loss: $96,000.00

Drew Augenstein
OWENSBORO MEDICAL HEALTH SYSTEM
formerly Owensboro Mercy Health System
P.O. Box 20007
Owensboro, KY 42304-0007
Reference: ABTOX Sterilizer Case Restitution
Loss: $101,000.00

IPC THE HOSPITALIST
formerly Precedent Health Center
2000 S. Colorado Boulevard #420
Denver, CO 80222
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $100,000.00

ADVOCATE HEALTH AND HOSPITALS CORPORATION
RE: RAVENSWOOD HOSPITAL MEDICAL CENTER
2025 Windsor Drive
Oak Brook, IL 60523
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $115,000.00

Susan Hallman
Director of Risk Management and Compliance Officer
ROCKDALE HOSPITAL
1412 Milstead Avenue N.E.
Conyers, GA 30012
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

YAMPA VALLEY MEDICAL CENTER
formerly Routt Memorial Hospital
1024 Central Park Drive
Steamboat Springs, CO 80487
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $100,000.00

Charles Koval
Deputy General Counsel
SHANDS AT THE UNIVERSITY OF FLORIDA
720 Southwest 2nd Avenue
Suite 360A
Gainesville, FL 32601
Reference: ABTOX Sterilizer Case Restitution
Loss: $199,650.00

Dr. Wayne Hannah
SOUTHEAST ALABAMA MEDICAL CENTER
P.O. Box 6987
Dothan, AL 36302
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Diane Miller
SOUTHWEST MEDICAL CENTER
315 West 15th street
P.O. Box 1340
Liberal, KS 67901
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

Dan Hamman
Chief Financial Officer
SPARKS REGIONAL MEDICAL CENTER
1311 South I Street
Fort Smith, AR 72917-7006
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

Kristine Cerro
Legal Counsel
ST. AGNES MEDICAL CENTER
1303 E. Herndon
Fresno, CA 93720
Reference: ABTOX Sterilizer Case Restitution
Loss: $112,500.00

ST. ANTHONY HOSPITAL
c/o Cashier
1601 S.E. Court Avenue
Pendleton, OR 97801
Reference: ABTOX Sterilizer Case Restitution
Loss: $103,000.00

ST. BERNARD HOSPITAL
Executive Office
326 West 64th Street
Chicago, IL 60621
Reference: ABTOX Sterilizer Case Restitution
Loss: $108,000.00

UNITED HOSPITAL SYSTEM
ST. CATHERINE'S HOSPITAL
Business Office
6308 8th Avenue
Kenosha, WI 53143
Reference: ABTOX Sterilizer Case Restitution
Loss: $59,140.00

ST. EDWARD MERCY MEDICAL CENTER
P.O. Box 504273
St. Louis, MO 63150-4273
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

Michele McKee
Chief Financial Officer
GATEWAY REGIONAL MEDICAL CENTER
formerly St. Elizabeth Medical Center
2100 Madison Avenue
Granite City, IL 62040
Reference: ABTOX Sterilizer Case Restitution
Loss: $115,000.00

ST. ELIZABETH MEDICAL CENTER
Risk Management Department
One Medical Village Drive
Edgewood, KY 41017
Reference: ABTOX Sterilizer Case Restitution
Loss: $97,500.00

Robin Neils
ST. FRANCIS HOSPITAL
34515 9th Avenue South
Federal Way, WA 98003
Reference: ABTOX Sterilizer Case Restitution
Loss: $103,000.00

FRANCISCAN SKEMP HEALTHCARE
formerly St. Francis Medical Center
700 West Avenue South
LaCrosse, WI 54601
Reference: ABTOX Sterilizer Case Restitution
(U.S. v. Ross Caputo)
Loss: $115,000.00

Mike Merrigan
General Counsel
ST. JOHN'S REGIONAL HEALTH CENTER
1235 E. Cherokee Street
Springfield, MO 65804
Reference: ABTOX Sterilizer Case Restitution
Loss: $100,000.00

Rick West
Director of Finance
SAINT JOSEPH HOSPITAL
One Saint Joseph Drive
Lexington, KY 40504
Reference: ABTOX Sterilizer Case Restitution
Loss: $96,000.00

Linda Boucher
Legal Department
EXEMPLA HEALTHCARE
ST. JOSEPH HOSPITAL
2420 West 26th Avenue, Suite 100D
Denver, CO 80211
Loss: $212,000.00

Ted Andrews-Arico
Materials Management
ST. JOSEPH MEDICAL CENTER
1717 South J Street
Tacoma, WA 98401
Reference: ABTOX Sterilizer Case Restitution
Loss: $103,000.00

ST. JOSEPH MERCY HOSPITAL OAKLAND
44405 Woodward Avenue
Pontiac, MI 48341
Reference: ABTOX Sterilizer Case Restitution
Loss: $100,629.00

ST. JOSEPH MERCY HEALTH SYSTEM
ST. JOSEPH MERCY HOSPITAL
Legal Department
5301 E. Huron River Drive
Ypsilanti, MI 48197
Reference: ABTOX Sterilizer Case Restitution
Loss: $180,000.00

ST. LUKE'S REGIONAL MEDICAL CENTER
190 E. Bannock Street
Boise, ID 83712
Reference: ABTOX Sterilizer Case Restitution
Loss: $108,000.00

ST. VINCENT HOSPITAL
455 Saint Michaels Drive
Santa Fe, NM 87505-7663
Reference: ABTOX Sterilizer Case Restitution
Loss: $224,000.00

Robert Ching
General Counsel
HAWAII PACIFIC HEALTH
(STRAUB CLINIC AND HOSPITAL)
55 Merchant Street, Suite 2700
Honolulu, HI 96813
Reference: ABTOX Sterilizer Case Restitution
Loss: $105,000.00

John Smiley
Chief Executive Officer
SUNNYSIDE COMMUNITY HOSPITAL
1016 Tacoma Avenue
Sunnyside, WA 98944-0719
Reference: ABTOX Sterilizer Case Restitution
Loss: $105,000.00

Debbie Hay
President
TEXAS INSTITUTE FOR SURGERY AT PRESBYTERIAN HOSPITAL OF DALLAS
formerly Surgery Center Southwest
7115 Greenville Avenue, Suite 215
Dallas, TX 75231
Loss: $115,000.00

Cindy Strauss
General Counsel
SWEDISH MEDICAL CENTER
747 BROADWAY
SEATTLE, WA 98122-4307
Reference: ABTOX Sterilizer Case Restitution
Loss: $318,000.00

SEND RESTITUTION TO:
PROMEDICA HEALTH SYSTEM
Legal Department
2121 Hughes Drive
Toledo, OH 43606
PAYABLE TO TOLEDO HOSPITAL
Reference: ABTOX Sterilizer Case Restitution
Loss: $230,000.00

TUCSON HEART HOSPITAL
4888 N. Stone Avenue
Tucson, AZ 85704-5799
Reference: ABTOX Sterilizer Case Restitution
Loss: $109,000.00

10th MEDICAL GROUP
4102 Pinion Drive
USAFA, CO 80840
Reference: ABTOX Sterilizer Case Restitution
Loss: $99,900.00

UNITED MEDIAL CENTER
214 East 23rd Street
Cheyenne, WY 82001
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case Restitution)
Loss: $110,000.00

UNIVERSITY OF CALIFORNIA DAVIS – UCD MEDICAL CENTER
4501 X Street
Sacramento, CO 95817
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $110,000.00

UNIVERSITY HOSPITAL
2211 Lomas Boulevard, N.E.
Albuquerque, NM 87106
Reference: ABTOX Sterilizer Case Restitution (U.S. v. Ross Caputo, et al.)
Loss: $100,400.00

UNIVERSITY MEDICAL CENTER
1501 North Campbell Avenue
Tucson, AZ 85724-5175
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case Restitution)
Loss: $110,000.00

UNIVERSITY OF CALIFORNIA –
H.C. MOFFITT HOSPITAL
UCSF Box 0550
San Francisco, CA 94143-0001
Reference: U.S. v. Ross Caputo, et al.
(ABTOX Sterilizer Case Restitution)
Loss: $110,000.00

UNIVERSITY OF CALIFORNIA –
MT. ZION HOSPITAL
1600 Divisadero Street
San Francisco, CA 94115-3006
Reference: U.S. v. Ross Caputo, et al.
(ABTOX Sterilizer Case Restitution)
Loss: $110,000.00

Mr. Anthony Ferrara
Vice Chancellor for Finance and Operations
UNIVERSITY OF TENNESSEE HEALTH
SCIENCE CENTER
formerly University of Tennessee Bowld Hospital
62 South Dunlap Street, Suite 300
Memphis, TN 38163
Reference: U.S. v. Ross Caputo, et al.
(ABTOX Sterilizer Case Restitution)
Loss: $212,000.00

Paul Ishizuka
Chief Financial Officer
UNIVERSITY OF WASHINGTON MEDICAL
CENTER
1959 N.E. Pacific Street
Box 356151 Administration
Seattle, WA 98105-6151
Reference: U.S. v. Ross Caputo, et al.
(ABTOX Sterilizer Case Restitution)
Loss: $207,500.00

Regarding VETERANS ADMINISTRATION MEDICAL CENTERS:

The mailing address for check payments is:
Department of Veterans Affairs
c/o Agent Cashier
ABTOX, Inc. Restitution
P.O. Box 149975
Austin, TX 78714-8975
Reference: ABTOX Restitution

The total loss is $1,228,460.60 which is broken down as follows:

VA Medical Center	Date Shipped	Amount Paid
Dallas, TX	10/12/95	$86,250.00
Northport, NY	10/18/95	$92,000.00
Omaha, NE	04/03/96	$102,360.00
Iowa City, IA	12/20/95	$92,000.00
Tomah, WI	08/28/96	$92,000.00
Portland, OR	02/29/96	$92,000.00
Columbia, MO	06/07/96	$92,000.00
Houston, TX	10/03/96	$92,000.00
Palo Alto, CA	06/09/95	$86,250.00
San Francisco, CA	04/30/97	$100,400.00
St. Louis, MO	08/22/97	$100,400.00
Dallas, TX (2 units)	09/29/97	$200,800.00

Kevin Lawlor
VAIL VALLEY MEDICAL CENTER
181 West Meadow Drive
Veil, CO 81657
Reference: U.S. v. Ross Caputo, et al.
(ABTOX Sterilizer Case Restitution)
Loss: $115,000.00

Charlotte Frey
Assistant Director, Department of Finance
VANDERBILT UNIVERSITY MEDICAL CENTER
Crystal Terrace, Suite 900
3319 West End Avenue
Nashville, TN 37232-8480
Reference: ABTOX Sterilizer Case Restitution
Loss: $98,500.00

General Counsel
WASHINGTON REGIONAL MEDICAL CENTER
3215 North Hills Boulevard
Fayetteville, AR 72703
Reference: ABTOX Sterilizer Case Restitution
Loss: $110,000.00

WILCOX MEMORIAL HOSPITAL
3-3420 Kuhio Highway
Lihue, HI 96766
Reference: U.S. v. Ross Caputo, et al. (ABTOX Sterilizer Case Restitution)
Loss: $110,000.00

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ■ Special instructions regarding the payment of criminal monetary penalties:

Defendant shall pay the $975 special assessment immediately.

Defendant shall pay the $17,209,074.50 restitution immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of

Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

■ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Robert M. Riley, 03 CR 126-2

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ruben Castillo	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	03 CR 126 - 1,2	**DATE**	9/5/2006
CASE TITLE	USA vs. Caputo and Riley		

DOCKET ENTRY TEXT

The Court conducted an evidentiary hearing on juror Ryan's voir dire answers and service as a juror in light of a story which appeared in *USA Today on 7/20/06.* After consideration of the record established by juror Ryan's responses the Court concludes in the exercise of its discretion, pursuant to the standards of *McDonough Power Equipment, Inc. v. Greenwood,* 104 S.Ct. 845 (1984), that defendant's amended motion for a new trial must be denied for all the reasons stated on the record in chambers. The Court expressly concludes that juror Ryan served as an honest, capable and unbiased juror throughout the extended trial. *See United States v. Medina,* 430 F.3rd 869, 875-880 (7th Cir. 2005).

Docketing to mail notices.

Courtroom Deputy Initials:	RO

No. 03 CR 126-1, 2

United States District Court,
Northern District of Illinois

USA vs. Caputo and Riley

9/5/2006

* * *

[21] Mr. Feld.

At this point, I'm going to deny the pending motion for a new trial. I don't see anywhere that the defense comes anywhere close to satisfying the standards laid out in an opinion that I totally agree with, don't always agree with Justice Rehnquist, but I will tell you that this motion that comes under McDonough versus Greenwood is firmly committed to the discretion of the trial court judge who presides over jury selection, presides over the trial, and I don't see anywhere near that the defense comes to showing the standards laid out in that opinion.

I think what happened unfortunately was an honest mistake by Mr. Ryan, but I've said before and I'll say again that he served admirably throughout this trial. There's no signs of any type of addictive behavior, was consistently here day in, day out, was an impartial jury – juror from beginning until the end when the jury concluded its jury deliberations.

If anything, the information that has come out would possibly have justified some action by the government in the form of a motion for a peremptory,

but certainly not even for cause on either side. Misdemeanor convictions do not justify dismissing a juror for cause.

And as I said before, there are plenty of jurors who serve on juries in our court all the time who are [22] probably battling all kinds of addictive behavior. And so at this point, we need to put this to an end, and I'm going to proceed with sentencing a week from tomorrow at 1:30 in the afternoon. I will see you all then.

Thank you.

* * *